IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

DEANDRE D. DEWITT,

:

Petitioner, Case No. 3:08-cv-409

:

-vs- Magistrate Judge Michael R. Merz

WANZA JACKSON, Warden, et al.,

:

Respondents.

DECISION AND ORDER ON CERTIFICATE OF APPEALABILITY

This habeas corpus action is before the Court on request from the Court of Appeals for a ruling on a certificate of appealability.

The parties unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. § 636(c) and the case was referred on that basis (Doc. No. 6). On April 1, 2009, the Court filed a Decision and Order denying the writ and the Clerk entered judgment as directed, dismissing the Petition with prejudice (Doc. Nos 8, 9). On April 28, 2009, the Petitioner filed a Notice of Appeal (Doc. No. 11) and a Motion for Leave to Appeal *in forma pauperis* (Doc. Nos. 10, 11). Since the Motion stated only financial facts and made no argument regarding the merits of the appeal, the Court denied leave to appeal *in forma pauperis* without prejudice to renewal in conjunction with a motion for certificate of appealability (Notation Order, May 11, 2009). On May 7, 2009, the Sixth Circuit Case Manager wrote to Petitioner about the need for a certificate of appealability (Doc. No. 13). Despite these reminders, no motion for certificate of appealability has ever been filed, so the

Court proceeds to consider that question *sua sponte*.

A person seeking to appeal an adverse ruling in the district court on a petition for writ of habeas corpus or on a § 2255 motion to vacate must obtain a certificate of appealability before proceeding. 28 U.S.C. §2253 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), provides in pertinent part:

> (c)
>
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

District courts have the power to issue certificates of appealability under the AEDPA in §2254 cases. *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996)(en banc). Likewise, district courts are to be the initial decisionmakers on certificates of appealability under §2255. *Kincade v. Sparkman*, 117 F.3d 949 (6th Cir. 1997)(adopting analysis in *Lozada v. United States*, 107 F.3d 1011, 1017 (2d Cir. 1997). Issuance of blanket grants or denials of certificates of appealability is error, particularly if done before the petitioner requests a certificate. *Porterfield v. Bell*, 258 F.3d 484(6th Cir. 2001); *Murphy v. Ohio*,

263 F.3d 466 (6th Cir. 2001).

To obtain a certificate of appealability, a petitioner must show at least that "jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). That is, it must find that reasonable jurists would find the district court's assessment of the petitioner's constitutional claims debatable or wrong or because they warrant encouragement to proceed further. *Banks v. Dretke*, 540 U.S. 668, 705 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). If the district court dismisses the petition on procedural grounds without reaching the constitutional questions, the petitioner must also show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484. The procedural issue should be decided first so as to avoid unnecessary constitutional rulings. *Slack*, 529 U.S. at 485, citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)(Brandeis, J., concurring). The first part of this test is equivalent to making a substantial showing of the denial of a constitutional right, including showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further, *Slack v. McDaniel*, 529 U.S. 473 at 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000), quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The relevant holding in *Slack* is as follows:

> [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

529 U.S. at 478.

The standard is higher than the absence of frivolity required to permit an appeal to proceed *in forma pauperis. Id.* at 893.

> Obviously the petitioner need not show that he should prevail on the merits... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'

Id. n.4. *Accord, Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1039-1040, 154 L.Ed.2d 931 (2003). A certificate of appealability is not to be issued pro forma or as a matter of course. *Id*. at 1040. Rather, the district and appellate courts must differentiate between those appeals deserving attention and those which plainly do not. *Id*. A blanket certificate of appealability for all claims is improper, even in a capital case. *Frazier v. Huffman*, 348 F.3d 174 (6th Cir. 2003), *citing Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001).

Petitioner pled two grounds for relief:

> **Ground One:** Petitioner was denied his right to Due Process of Law when the court denied his request for the appointment of an expert witness on the subject of eyewitness identification.
>
> **Ground Two:** Petitioner was denied his right to Due Process of Law when over defense objection dog tracking evidence was admitted.

(Petition, Doc. No. 1).

The Ohio Supreme Court rejected Petitioner's first claim on the merits and this Court found that there was no United States Supreme Court precedent which clearly established the right for which Petitioner was contending. (Decision and Order, Doc. No. 8, at 9.) Upon review under the certificate of appealability standard, the Court finds that no reasonable jurist would disagree with

this conclusion.

With respect to the second Ground for Relief, the Court held:

> Applying the *Maupin* analysis, the Court notes that Ohio does have a rule that objections to evidence made by motion in limine are waived unless renewed at trial for which the Court of Appeals cites its own prior decision in *State v. Cephus*, 161 Ohio App.3d 385, 2005 Ohio 2752, 830 N.E.2d 433 (Ohio App. 2nd Dist 2005). Recent Ohio Supreme Court case law confirms the existence of this rule. *State v. Diar*, 120 Ohio St. 3d 460 at ¶ 70 (2009), *citing Gable v. Gates Mills*, 103 Ohio St. 3d 449 ¶ 34, 2004 Ohio 5719, 816 N.E. 2d 1049 (2004), and enforcing the rule in a capital case.

(Decision and Order, Doc. No. 8, at 16.)

The Court concludes that reasonable jurists would not disagree with its conclusion that the second Ground for Relief was procedurally defaulted.

Conclusion

Based on the foregoing reasoning, the Petitioner is denied a certificate of appealability on both Grounds for Relief. The Clerk shall notify the Court of Appeals of the entry of this Order.

June 29, 2009.

s/ **Michael R. Merz**

United States Magistrate Judge